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No. 76-1372

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD JOSEPH TODARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the evidence was insufficient to support his conviction.

Following a jury trial in the United States District Court for the Western District of New York, petitioner was convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955, and of destruction of property to prevent its lawful seizure by F.B.I. agents, in violation of 18 U.S.C. 2232.[1] He was sentenced to concurrent terms of three years' imprisonment on the gambling

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[1]A third count, charging petitioner with conspiracy to engage in an illegal gambling business, in violation of 18 U.S.C. 371, was dismissed by the district court at the close of the evidence (App. 728-729, 786). ("App." refers to the appendix filed in the court of appeals.)

count and one year's imprisonment on the destruction of property count (App. 991). The court of appeals reversed petitioner's gambling conviction, finding that the evidence was insufficient, but it affirmed his conviction for destruction of property (Pet. App. A; 550 F. 2d 1300).

1. The evidence at trial showed that on March 5, 1972, a warrant was issued by a federal magistrate, authorizing agents of the Federal Bureau of Investigation to search petitioner's person and residence for flash paper. On the following morning, F.B.I. Agents George Fellows and James Caufield went to petitioner's house, knocked on the front door, and announced that they were federal agents present to execute a search warrant. When no one came to the door, Agent Fellows went to the back of the house, entered the premises through the unlocked rear door, and again announced his authority and purpose. Agent Fellows then opened the front door for Agent Caufield (App. 609-611).

After a cursory search of the first floor, Agents Fellows and Caufield ascended a flight of stairs and announced for the third time that they were federal agents armed with a search warrant.[2] As the agents approached the doorway to the master bedroom, Agent Fellows saw petitioner leap from the bed and run approximately five feet across the room to a small desk. The agent next observed an almost instantaneous bright reddish-orange flame which left no residue or ashes (App. 611-614). These

[2]It is not entirely clear from the record whether Agent Fellows announced his presence by stating "F.B.I." or "F.B.I. search warrant." On direct examination, the agent testified that he had used the latter phrase; on cross-examination, however, he conceded that he did not specifically recall whether he had announced that he had a warrant. Agent Fellows was certain, in any event, that he had disclosed his identity as an F.B.I. agent (App. 609-614, 619, 622-626).

characteristics indicate that the substance that petitioner burned was flash paper—a type of paper, capable of being destroyed rapidly and without a trace, that is commonly used to keep gambling records (App. 538-540).

2. Petitioner contends that the evidence was insufficient to establish that he destroyed the flash paper with knowledge that it was subject to seizure pursuant to a search warrant. This claim is clearly rebutted by the record. The jury was instructed that, in order to convict, it had to find that petitioner was aware "under the circumstances [that] * * * the agent had a search warrant" and that petitioner "acted intentionally and with a specific disregard of the law" (App. 953).[3] As the court of appeals concluded (Pet. App. A-7), the jury's finding of criminal intent was supported by the evidence, since petitioner's "actions in leaping from his bed and igniting flash paper were indicative of his desire to destroy to prevent seizure." The agents had announced their presence no fewer than three times. When they reached petitioner's bedroom, his first act was to run to his desk and to ignite the flash paper. The only plausible inference that can be drawn from petitioner's conduct is that he feared that the paper was about to be seized by the agents and that he

[3]Although petitioner contends that the decision below conflicts with *United States* v. *Gibbons*, 331 F. Supp. 970 (D. Del.), affirmed, 463 F. 2d 1201 (C.A. 3), he conceded in his brief in the court of appeals that the trial court's charge to the jury "tracked the language of *Gibbons*" (Br. 35). We note, however, that Section 2232 expressly prohibits the destruction of property in order to prevent its seizure by any person authorized to make searches and seizures. There is no requirement that the defendant be aware that his property is subject to seizure by warrant. Although the district court in *Gibbons* added that extraneous element, the court of appeals' *per curiam* affirmance held that "[a]ny destruction at any time to prevent a lawful seizure is prohibited" by Section 2232. 463 F. 2d at 1202.

sought to prevent that seizure.[4] See *United States* v. *Woodring*, 536 F. 2d 598, 599-600 (C.A. 5), certiorari denied, No. 76-5448, December 6, 1976.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.

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[4]Petitioner asserts (Pet. 9-10) that it was equally inferable from his actions that he was seeking to prevent seizure of the flash paper by state police officers, rather than by federal agents. Even if this were in fact the case, it would not relieve petitioner of liability under Section 2232. Cf. *United States* v. *Feola*, 420 U.S. 671. As petitioner acknowledges (Pet. 10), possession of flash paper is a crime under New York law (Penal Law, Consolidated Laws of New York Annotated, § 225.15(3) (McKinney's, Cum. Pocket Part 1976-1977)), as is the willful destruction of evidence (Penal Law, *supra*, Section 215.40(2) (McKinney's, 1975)). Under these circumstances, "[t]he concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequences for the choice of a judicial forum." *United States* v. *Feola*, *supra*, 420 U.S. at 685.